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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-766

AMERICAN CAST IRON PIPE COMPANY,
Petitioner,

v.

RUSH PETTWAY, et. al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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On Petition For a Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The petition for certiorari inadequately describes the procedural and evidentiary posture of the present case. The decision below in the Court of Appeals involved an extraordinary effort by that Court to enforce its mandate of 1974 after the district court failed to implement that mandate on remand. *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir.

1974).[1] Substantially all of the questions presented by the petition were decided adversely to the petitioner in the 1974 decision of the Court of Appeals, from which there was no review sought in this Court.[2] In this posture the Court of Appeals was primarily exercising its supervisory powers to assure enforcement of the "law of the case" set out in rigorous detail in its 1974 opinion.[3] To understand the unique posture of the present case, a fuller review of the proceedings below than that provided in the petition is required.

The Court of Appeals in its 1974 decision determined that the petitioner utilized a series of illegal practices in the post-Act period which restricted black employees to the lower paying, less desirable jobs and departments. These practices included illegal testing, education requirements, age restrictions in the training programs, and subjective judgments of a predominantly white supervisory staff. To remedy such practices the Court of Appeals

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[1] The 1974 decision of the Court of Appeals is hereafter cited as "*Pettway III*" in accordance with the decision below.

[2] Those questions which were decided in the 1974 decision of the Court below, and which in the 1978 decision only involved the issue of compliance with the prior mandate, appear sequentially in the Company's Petition as Questions 1, 2 and 4. Pet. for Cert. 2-3. Only Question 3, which concerns the invalidation of releases signed by some class members, involves an issue which was first decided in the 1978 decision of the Court of Appeals. The fifth and sixth questions which are "reserved" by the Company in footnote one of its Petition involve issues which were decided in 1974 but which are arguably affected by intervening decisions of this Court.

[3] As to the central question which pervades virtually the entire petition, the business necessity of the lines of progression, the Court of Appeals set out the limits of its review explicitly.

> ... this appeal is not the proper vehicle for presenting defendant's disagreement with the court's holding in *Pettway III*. Alleged errors in a prior decision are properly raised in petitions for rehearing or by writ of certiorari to the Supreme Court. The "law of the case" doctrine... precludes reconsideration of decided questions on a subsequent appeal, absent the most cogent reasons such as the avoidance of manifest injustice. [citations omitted] No such reasons are present here. (App. 137 n. 42).

determined that the promotion and transfer procedures would necessarily have to be restructured because they perpetuated the effects of the post-Act discrimination and impeded black employees movement to their rightful place. The Court examined the business necessity of the line of progression promotion and transfer procedures and found that "[t]he record discloses no proof by the company that positions in other than craft or technical lines of progression are functionally related". *Pettway III*, 294 F.2d at 246-247.

Accordingly, the Court of Appeals directed the District Court to provide the plaintiff class with seniority relief "carefully tailored to assure that no employee would have a right to a job that he could not perform properly." *Pettway III*, 494 F.2d at 247.[4] The Court also determined that back-pay should be awarded in this case but left the method of calculations to the discretion of the District Court in the first instance. *Id.* at 263.

On remand the petitioner submitted to the District Court its proposed Decree to implement the mandate of injunctive and monetary relief. The plaintiff class immediately submitted extensive written objections. The back-pay calculation formula evolved considerably during a period of several months, a period in which the Court of Appeals characterized the trial judge as "negotiating with the class". (A. 91).

The injunctive relief proposed in August, 1974, however, changed very little and the plaintiff class renewed their objections during early 1975 on January 3 and May 9. On May 14, 1975, over the objections of the plaintiff class, without any further evidentiary hearings and on the basis of the 1971 trial record, the District Court entered the petitioner's proposed injunctive relief as its own Decree without any changes except those suggested by petitioner for its own business convenience. (A. 84-86, 136).

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[4] It also provided certain other affirmative relief which is not contested in the Petition and not discussed herein.

The plaintiff class again resubmitted their objections to the District Court which set the motion down for an evidentiary hearing. Before that hearing could be held, however, the District Court entered a negotiated settlement of the back-pay issue without notice or opportunity to object being given to the plaintiff class and overruled all objections. The Final Judgment awarded varying amounts of compensation to any black employee who was hired before the effective date of Title VII, and worked at least one year in the post-Act period.[5]

Over seventy per cent of the back-pay subclass together with a significant number of the class members not awarded any back-pay objected *pro se* to the May 14 Decree and June 12 Final Judgment. (A. 75-76, 172-174). Because there was no evidence in the record to support either the injunctive relief or the back-pay settlement, the District Court conducted a one day hearing some five months after final judgment was entered for the purpose of establishing the course of the proceedings on remand and the evidentiary materials which supported the disposition of the case.

The petitioner introduced at the hearing a "stipulation" executed by its counsel and the former counsel for the class, over the objection of the class itself, which recited the substance of the various conferences in chambers and over the telephone with the District Judge and which had attached to it literally thousands of pages of documents which had been utilized during the proceedings on remand. The District Judge found that the stipulation and its documentary exhibits fully and accurately established the basis of the injunctive relief and the back-pay settlement. The petitioner declined to introduce any further evidence, either by testimony or otherwise. The plaintiff class introduced three preliminary class member witnesses and then

[5] The Court of Appeals found the exclusion of the 1,400 class members hired after July 2, 1965 to be the District Court's own judgment but the calculation of the awards of the back-pay subclass to have been a negotiated settlement, albeit without the consent of the class. (A. 86-92).

was forbidden by the District Court to submit any further evidence.

On November 20, 1975 the District Court entered a Final Order and Modified Judgment which directed that the two-thirds of the back-pay subclass which had rejected their awards either cash their checks by December 15, 1975 or be deemed to have opted out of the case altogether. Subsequently, the District Court entered Judgment setting aside and anulling back-pay awards to 442 members of the back-pay subclass of 841.

On the fourth appeal to the Fifth Circuit the case was again reversed in part and affirmed in part. Specifically the Court of Appeals determined that the District Court injunctive relief, based in large part on a line of progression promotion and transfer procedure very similar to the one directed to be enjoined in 1974, continued to impede class members movement to their rightful place. (A. 128-140). In some of its application, the injunctive relief was even more restrictive than the promotion and transfer procedures directed to be restructured in 1974.[6] (A. 130-131). The Court carefully considered the business necessity of the restrictions on class member's movement to their rightful place and found the record "totally devoid of competent evidence of business necessity" in non-craft positions. (A. 132-138).

Accordingly, the Court of Appeals structured seniority relief which is tailored[7] to insure that no employee will receive a

[6] The Court of Appeals also found certain limitations on the red-circling, residency periods, reduction-in-force, recall and training program remedies to perpetuate the effects of post-Act discriminatory practices and to not be justified by business necessity. (A. 143-149, 152-163).

[7] The Court of Appeals remanded the seniority relief to the District Court for a determination of the *bona fides* of the seniority system under this Court's decision in **Teamsters v. U.S.**, 431 U.S. 324 (1977). The final meaning of the relief structured by the Court of Appeals will not be determined until after the District Court's determination of this issue. (A. 119-127).

position for which he is not qualified to perform.[8] The District Court's approval of the back-pay settlement over the objections of the class was found to be an abuse of discretion and the opt-in, opt-out procedures utilized below were found to be unduly coercive of class member's rights. The settlement was reversed and the class members who executed releases were allowed to participate in further back-pay proceedings after making assurances satisfactory to the District Court that back-pay already received will be reimbursed if a lesser award is granted on remand.

[8] The means utilized by the Court of Appeals to tailor the seniority relief is discussed below in I. C. 2. of the Reasons For Denying the Writ section of this Brief. It primarily consisted of a finding of business necessity for the jobs and residency periods in the craft and technical lines of progression, affirming limitations on red-circle and advanced entry remedies which were attacked below by respondents, and permitting the District Court to allow the petitioner a third opportunity on remand to prove the business necessity of the non-craft LOP's.

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS CORRECTLY APPLIED THE BUSINESS NECESSITY DOCTRINE AND THE REMEDIES IMPOSED ARE WORKABLE AND NOT PREMATURE

A. The Remedies Are Not Premature

Conspicuously absent from the Petition in this case is any denial by the petitioner that it has discriminated against black employees in the ways found by both the District Court and the Court of Appeals.[9] The central contention of the petition concerns the propriety of the remedies mandated in 1974 and reiterated in the decision below regarding the petitioner's promotion and transfer practices.

It is important to note at the outset that the petitioner does not deny that the practices presently utilized impede a black employees movement into jobs that were denied him in the pre-Act period by formal segregation and in the post-Act period by illegal testing, education requirements and subjective judgments of an all white supervisory staff. (A. 128-131). Rather, the petitioner argues that after thirteen years of litigation and four appeals the Court below acted prematurely in allowing black employees any immediate relief from such practices.

The petitioner's argument in this respect entirely misconcieves the meaning of the business necessity doctrine and its role in adjudicating Title VII cases. Once practices have been shown to have a disparate impact, as the promotion and transfer practices were here, the defendant Company is accorded the opportunity to prove that the practices are dictated by business necessity. It is not the burden of the party discriminated against to disprove the business necessity of the Company's practices. Rather, it is the burden of the Company to prove that the discriminatory effects of

[9] See e.g., A. 113-115, 128-132, 139-140 143-162

the practices should be allowed to continue because they are "necessary to safe and efficient job performance". *Dothard v. Rawlinson,* 433 U.S. 322 n. 14.[10]

In this context, the petitioners repeated allegations that the plaintiff class failed to request a trial on remand[11] and should share the blame for the lack of evidence on business necessity completely reverses the burden of proving business necessity. The plaintiff class met its burden of proving the discriminatory impact of the promotion and transfer procedures and the petitioner failed to carry its burden of proving the business necessity at the 1971 trial. The Court of Appeals determined in 1974 that the "record discloses *no proof* by the company that positions in other than craft or technical lines of progression are functionally related." (A. 135). Accordingly, the practices were found violative of the Act and affirmative relief was mandated. *Pettway III,* 494 F.2d at 235-236.

To excuse their failure of proof the petitioner argues that the issue of business necessity of the lines of progression was never raised in the 1971 trial and that they are now denied due process because of that fact. Pet. for Cert. 31. This assertion is obviously inaccurate. The District Court made specific factual findings that the "jobs in the lines of progression as practiced in each department are functionally related, one to the other". *Pettway v. American Cast Iron Pipe Co.,* 7 FEP 1010, 1013, 1019 (N.D. Ala. 1972). The petitioner argued on the basis of this finding in the 1974 and 1978 appeals that business necessity should be found from the record of the 1971 trial. *Pettway III,* 494 F.2d at 245; *Pettway IV,* A. 136 n.42. On remand from the 1974 Court of Appeals mandate, the district court again found the lines of

[10] Contrary to the petitioner's arguments this is the standard utilized below. See, *Pettway III,* 494 F.2d at 246-247 and *Pettway IV* at A. 135-138.

[11] As discussed more fully below, this allegation is completely unsupported by the record. The respondent class did request a trial on remand and the petitioner opposed it.

progression functionally related on the basis of the 1971 trial record. (A 136). Never once, on either appeal or remand, has the petitioner ever argued that the business necessity of the lines of progression was not tried in the 1971 trial.[12]

On remand in 1974, the petitioner chose to unilaterally revise[13] a few aspects of its lines of progression[14] without offering even the barest shred of new evidence to support the business necessity of a single job progression. The petitioner's argument that the 1975 lines of progression are supported by "substantial information" which was before the District Court, but does not appear in the record, is simply not credible.

First, the only discussion of what such considerations might be is contained in the Petition.[15] The petitioner admits, however, that these considerations "have not been subjected to cross-

[12] Even if it had not been tried in 1971, the Court of Appeals certainly put the petitioner on notice in its 1974 mandate that proof of business necessity of the lines of progression would have to be forthcoming. *Pettway* III, 494 F.2d at 247. Due process requires only the opportunity for a hearing. See e.g., *Mitchell v. W. T. Grant Co.,* 416 U.S. 600, 612-613 (1974). The petitioner in the present case declined the opportunity on remand. (A. 133-134, 140). Certainly due process does not require endless proceedings when a party consistently fails to carry its burden of proof.

[13] The petitioner revised its lines of progressions on its own and submitted them to the Court in August, 1974. Despite the immediate and continued objections of the plaintiff class, the district court adopted those lines of progressions without any change in the May 14, 1975 Decree.

[14] Contrary to the assertions of the petitioner, there is far less job boxing and interconnecting between jobs at different levels of the 1975 LOP's then there was in the 1971 lines of progressions. There is also no appreciable change in the altitude of the entry level jobs in the 1975 LOP's. Only three out of fourteen departments have any pre-entry level jobs. These three are the predominantly black Monocast, Foundry and Melting departments.

[15] The petitioner never stated what considerations might support the business necessity of the LOP's in the proceedings on remand or in either appeal to the Fifth Circuit. The nine pages of considerations listed in the Petition at pages 21-29 is the first time anything more than generalized,

examination at trial, *considered by the District Court,* or reviewed by the Court of Appeals." Pet. for Cert. 21 (emphasis added). If evidence before the District Court was so plentiful, one must ask why it was not presented in the Petition or the proceedings below.

Secondly, the petitioner introduced as evidence below an *ex parte* "stipulation"[16] which encompassed every document which ever exchanged hands and a summary of every conference and telephone call which occurred after the 1974 remand. Nowhere in thousands of pages introduced as part of the stipulation was there any evidence concerning the business necessity of the lines of progression. In admitting the stipulation into evidence the District Judge stated that it fully and accurately described the proceedings which were had on remand. (A. 85 n.10).

Despite the failure of petitioner's proof and the fact that the plaintiff class does not bear the burden of disproving business necessity, the class repeatedly objected[17] to the proposed promotion and transfer procedures being based on line of progression position. (A. 83, 85, 86).[18] An evidentiary hearing to fully expose the lack of business necessity was also requested by the plaintiff

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conclusory claims of safety and efficiency has ever been produced by the petitioner. Evidence in the record already refutes most of these considerations. The ones not specifically addressed in the record amount to nothing more than "business convenience" rather than necessity.

[16] The purported "stipulation" was signed by the former counsel for the class without prior knowledge by their present counsel or the class representatives and was accepted into evidence over the objections of the class.

[17] Objections were filed by the plaintiff class in August, 1974, January 3, 1975, May 9, 1975, May 23, 1975, June 20, 1975 and August 30, 1975. The objections prior to final judgment on June 12, 1975 were overruled in that judgment without an opportunity for an evidentiary hearing.

[18] The discriminatory effect of the promotion and transfer procedures adopted on remand is summarized by the Court of Appeals in the decision below. (A. 127-131).

class before and after final judgment.[19] The petitioner, however, opposed any evidentiary hearings prior to final judgment and declined to introduce any evidence other than the stipulation already referred to at the hearing after final judgment.[20]

For these reasons, the Court of Appeals was correct in concluding that a third opportunity to prove business necessity was not warranted under the facts of this case. The Court of Appeals thoroughly examined the record of the 1971 trial and the proceedings on remand and found it "totally devoid of competent evidence of business necessity" and on this basis correctly decided that a workable remedy for the violations of the Act could not be delayed any longer.

After the extensive and exhausting proceedings which have been had in this case, it becomes ever more apparent that competent evidence of business necessity does not exist and that the petitioner has utilized the courts to delay its duty under Title VII and to wear thin the prosecution of this action. Having been given two full scale opportunities to prove its point, and seven years having passed in the interim, the petitioner cannot be said to have been denied due process and the Court of Appeals cannot be said to have acted prematurely in devising an immediate remedy.

B. Business Necessity In The Fifth Circuit Is Consistent With Supreme Court Decisions

In its 1974 decision the Court of Appeals found that the promotion and transfer procedures, including the lines of

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[19] On May 26, 1975 the District Judge set down an evidentiary hearing on plaintiffs' objections. The hearing was then cancelled and the objection overruled including the objection to the lack of business necessity for the lines of progression. After new counsel appeared for the class, another hearing was set down by the District Judge but after three preliminary class members testified the hearing was abruptly adjourned and the plaintiffs were denied the opportunity to call any further witnesses. This latter hearing was held five months after final judgment.

[20] The hearing after final judgment was held for the express purpose of developing a record of the evidence and proceedings which had informally exchanged hands prior to final judgment.

progression, carry forward into the present the discriminatory effects of the post-Act testing, education requirements and subjective judgments of a predominantly white supervisory staff and were not job related.[21] Accordingly, affirmative relief was mandated, *Pettway III,* 494 F.2d at 235-236.

In its formulation of the relief to be granted[22], the Court of Appeals left the petitioner free on remand to present "further evidence of positions requiring specific pre-requisite training" so that the seniority relief would be "carefully tailored to assure that no employee would have a right to a job that he could not perform properly". *Id.* at 247.

It is clear from the 1974 decision of the Court of Appeals that it did not leave the issue of liability open for further evidence on remand. The issue of liability was fully adjudicated and only the issue of remedies was remanded with instructions.[23] In the subsequent appeal the Court below considered business necessity only as a concept for adjusting the relative rights and interests of parties in shaping remedial relief.[24]

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[21] Both the District Court and the Court of Appeals utilized the term "functionally related". See, 7 FEP at 1013 and 494 F.2d at 246-247. It is clear from both decisions that the term "functionally related" means nothing more than what this Court has termed "job related". See e.g. *Griggs v. Duke Power,* 401 U.S. 242, 431-432 (1971); *Albermarle Paper Co. v. Moody,* 422 U.S. 405, (1975); *Dothard v. Rawlinson,* 433 U.S. 321, 329-332 (1977).

[22] The posture of the case at the time of the 1974 decision of the Court of Appeals was one where the district court had found discrimination on a number of points but had refused any remedies other than an award of attorney's fees and costs. (A.74)

[23] This is made clear by the structure of the Court of Appeals decision. The provision allowing further evidence of "positions requiring specific prerequisite training" on remand appears in the "Relief" section of the decision under subpart "B" which is entitled "Restructuring and Promotion Procedures".

[24] The consideration of business necessity in *Pettway IV* arose in the following context:

> Appellants allege that the promotion and transfer procedures adopted by the district court are insufficient to guarantee class members their rightful place within the company and do not comport with our mandate in *Pettway III.* To evaluate this contention, we must first determine whether the district court's order ensures that class-members reach their rightful place within the company at the first available opportunity. See *Pettway III, supra,* 494 F.2d at 243. If the procedures adopted by the district court do not fully effectuate this goal, we must then consider whether the impediments to the achievement by class members of their rightful place is justified by business necessity. (A. 127-128).

It was only in this context of shaping remedial relief through use of the business necessity doctrine that the issue of business necessity ever arose in the District Court or the Court of Appeals after the 1974 remand. The petitioner in its briefs to the Court of Appeals and in the proceedings on remand in the District Court never raised the issue of business necessity as a defense to liability. The Petition in this Court is the first time that such an assertion has been made.

This Court has increasingly required the lower federal courts to carefully shape the remedies imposed while still affording full "make whole" relief to the victims of illegal practices.[25] The petitioner itself argues for "a special blend of what is necessary, what is fair and what is workable". Pet. for Cert. 33.[26] It is exactly in this way that the Court of Appeals determined in 1974 and 1978 that the "utilization of plantwide seniority from the effective date

[25] It should be remembered in the present case that seniority relief was mandated to remedy various illegal practices and not just the perpetuating effects of the promotion and transfer procedures. Specifically, seniority relief was mandated to remedy the discriminatory effect of the petitioner's testing program, educational requirements, age restrictions in its training programs and the subjective judgments of a predominantly white supervisory staff, all of which had combined with the promotion and transfer procedures to deny the plaintiff class the requisite competitive position in the lines of progression to achieve their rightful place. The utilization of the business necessity concept on remand was allowed by the Court of Appeals not as a defense to liability for the testing program, education requirements, etc. but as a means to shape the seniority relief dictated by all of these discriminatory practices.

[26] Quoting from *Lemmon v. Kurtzman,* 411 U.S. 192, 200 (1973). See also, *Albermarle Paper Co. v. Moody,* 422 U.S. 405, 417-422 (1975) ("Where racial discrimination is concerned the district court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future'"); *Franks v. Bowman Transp. Co.,* 424 U.S. 747, 763-770 (1976)

of Title VII is necessary to remedy these actionable post-Act discriminatory practices", ie., the testing, education requirements and subjective judgments of an all white supervisory staff. (A. 121). It is in the sense of adjusting such seniority relief as a remedy for these other illegal acts that the Court of Appeals utilized the term "business necessity" in allowing further proof by the petitioner on remand. By doing so, the Court of Appeals was directing the District Court to evaluate each practice, to weigh its discriminatory effect against its function in the business and to compare it to alternatives and to proposed remedies in shaping the relief on remand.

The petitioner, however, confuses the Court of Appeals disposition of the promotion and transfer practices. They argue that the Court of Appeals should have evaluated the legality of the promotion and transfer practices *as such* under the three step analytical framework for practices which have a disparate impact on black employees. Pet. for Cert. 39. This would perhaps be true if the Court of Appeals had found the departmental lines of progression to be themselves illegal. The Court of Appeals, however, "carefully pointed out in *Pettway III* that these procedures should be enjoined, not because they are illegal, but because they 'carry forward into the present the stratification of black employees into lower paying, non-skill departments and jobs resulting from past discrimination'". (A. 145). In this posture the "business necessity" of the lines of progression arises only as a part of the remedial phase of the lawsuit, rather than as a part of the liability phase as the petitioner argues.

Even if the Court of Appeals had found the promotion and transfer procedures to be themselves illegal, the proper standard for judging job relatedness of the lines of progression was applied. This Court in *Dothard v. Rawlinson, supra,* stated that a "discriminatory employment practice must be shown to be necessary to safe and efficient job performance to survive a Title VII challenge". *Id* at 331 n. 14. The Court of Appeals decision below merely elaborates on the meaning of the word "necessary" by

pointing out that discriminatory practices must "directly foster safety and efficiency of a plant" and be "essential to those goals". (A. 115-116). The practices in the present case were not only not "necessary" in this sense, but there was "no proof" that the jobs in the non-craft lines of progression were even "functionally related". (A. 135-137). Under any standard of job relatedness the complete absence of proof must fail.

The petitioner's argument that the Fifth Circuit standard for business necessity is inconsistent with the job related standard in this Court also confuses the analysis of a disparate impact theory of discrimination with a disparate treatment theory. They argue that *Furnco Construction Co. v. Waters,* U.S. , 57 LEd 2d 957 (1978), requires that "the employer need only 'articulate some nondiscriminatory reason'" for the practice in question. This standard on the face of the decision, however, was applicable to the liability phase of an individual disparate treatment case and not to the remedies stage of a class disparate impact case.[27]

In addition, the Court of Appeals utilization of the business necessity concepts in the remedies phase of a lawsuit should necessarily be adapted to the special inquiry involved in that phase of the proceedings. This Court has noted the broad sweep of the remedial powers of §706 (g) of Title VII once violations of the Act are found. *Franks v. Bowman Transportation Co.,* 424 U.S. 747, 763-764 (1976); *Albemarle Paper Co., v. Moody,* 424 U.S. 405, 417-421 (1975). The Court of Appeals has exhaustively reviewed the extensive record in this case and measured the remedies imposed against the business necessity of the practices which the petitioner seeks to preserve despite their discriminatory

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[27] The petitioner is also in error to state that the Court of Appeals placed the burden of proving alternative practices on the Company. The decision below merely states that the district court must find "that each position in the line of progression within a department provides necessary training for the next higher job and that there are no acceptable alternatives for accomplishing the company's safety and efficiency goals". (A.116) The Court did not elaborate whose burden the proof of alternatives would be.

effects. This was a proper use of the business necessity concept in attempting to shape relief to the competing needs of the litigants and the nature of the violations found.

C. The Remedies Are Necessary, Fair and Workable

1. Threshold Qualifications

As a part of the remedial relief structured by the decision below the petitioner was instructed to develop objective standards for measuring "qualifications". (A. 141) When a class member still in the process of moving to his "rightful place" bids on a job and is the senior bidder, he is not to be rejected in favor of a junior white employee unless he does not possess the "threshold level of skill, knowledge and training necessary to perform the job adequately". (A.141).

To attack this provision of the relief the petitioner continues to mix apples and oranges. They argue that this remedy makes the promotion of employees on the basis of relative qualifications "illegal under the Act". Pet. for Cert. 36. This is clearly not what was done. The Court of Appeals did not find the use of relative qualifications to be illegal under the Act but merely required as a remedy for other illegal acts that where a class member bids on a job which he should have already received "but for" other discriminatory practices and for which he is qualified he should not be denied that job merely because a junior white employee may be "better qualified."[28]

This type of relief is essential to remedies structured on the "rightful place" theory, as this case was. The Fifth Circuit has rejected the "freedom now" theory of remedies which would allow black employees to bump junior whites out of jobs which "but

[28] The petitioner's reliance on *McDonnel Douglas Corp. v. Green*, 411 U.S. 792 (1973), again mixes the standards for determining liability in an individual disparate treatment case with the standards for determining remedial relief in a class disparate impact case.

for" discriminatory practices the black employee would have received. *Local 189, United Papermakers and Paperworkers v. United States*, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970). Instead, it has consistently required that black employees be given the next available opportunity to move to their "rightful place". *Pettway III*, 494 F.2d at 243-244. To require black employees to compete for the next available opportunity with junior white employees would be to deny the black employee the position he would already have "but for" the illegal testing and education requirements in favor of a white employee who would not have achieved better qualifications absent that same discrimination.

The petitioner essentially argues for the "status quo" theory of remedies whereby an employer simply ends explicit discriminatory practices and nothing more. *Local 189, United Papermakers and Paperworkers v. United States, supra.* That theory, however, has been uniformly rejected by each of the Circuits and is inconsistent with the broad approach to remedies prescribed by this Court. See e.g. *Albermarle Paper Co., v. Moody, supra.* Black employees should be allowed to move into the next available position which they would have occupied "but for" the illegal practices of the petitioner and for which they possess "the threshold level of skill, knowledge and training necessary to perform the job adequately". (A. 141). Anything less will not "make whole" class members denied their rightful place.

2. Plantwide Seniority

The petitioner argues that the use of plantwide seniority is unworkable at its facility and that the Court of Appeals usurped the power of the District Court in directing its use on remand. The only considerations which it advances in support of its claim that plantwide seniority is unworkable are matters which it admits "have not been subjected to cross examination at trial, considered by the District Court or reviewed by the Court of Appeals". Pet.

for Cert. 21. Such considerations after the long course of litigation in this case should not be accorded any weight.

The Court of Appeals directed in 1974 that the District Court "carefully tailor" the seniority relief on remand "to assure that no employee would have a right to a job that he could not perform properly". *Pettway III,* 494 F.2d at 247. On reviewing the relief accorded by the District Court on remand, the Court of Appeals concluded that remedies essential to moving class members to their rightful place had not been merely "tailored" but abolished altogether. (A. 127-140). Accordingly, it reviewed the extensive record which has accumulated over the years and fashioned remedial relief which is "carefully tailored" to what is necessary, fair and workable in the context of the rightful place approach to remedies.[29]

The remedies structured by the Court of Appeals took into account the considerations of unworkability advanced by the petitioner in this Court by: (1) allowing the use of departmental lines of progression proposed by the Company in the craft and technical departments (A. 139); (2) allowing the use of a one year residency period for all transferees into craft departments and technical departments whereby department senior whites can outbid plant senior blacks during the first year after transfer (A. 139 n. 46); (3) limiting red circling rights to class members hired prior to February 18, 1968[30] (A. 144-145); (4) limiting the use of red circling rights to transfers made within three years after the 1975 Decree (A. 147); (5) not requiring a greater number of "advanced entry" opportunities in the non-craft and craft departments, as argued for by the respondents in Briefs filed

[29] It should be remembered that the "rightful place" theory is itself a compromise from the "freedom now" approach to remedies. It conceptualizes within its very terms a "tailoring" to the competing needs of black employees, incumbent white employees and the Company by not allowing "bumping" of present holders of positions.

[30] This alone will prevent half of the current black workforce from exercising red circle rights.

below; (6) allowing the District Court to provide petitioner a third opportunity to prove business necessity of the non-craft departmental lines of progression (A. 162-163); (7) allowing further hearings on the priority given bids for on-the-job training from within the craft departments (A. 160-151); and (8) requiring that all employees promoted or transferred be qualified for the vacancy they fill. (A. 141).

The considerations of unworkability of the injunctive relief put forward by the petitioner are largely obviated by the "tailoring" of the remedies allowed by the Court of Appeals. The arguments that there will be a decrease in qualified personnel, a loss and dispersion of valuable skills and increased hazard to employee safety cannot be fully answered because it rests on the basic assumption that black employees can never be qualified for the better paying, more skilled jobs. This was an explicit defense of the petitioner to this action in the liability stage of this case and was soundly rejected on the evidence by the Court of Appeals. *Pettway III,* 494 F.2d at 230-231. It now reasserts itself in this Court and should be rejected as the type of bias which Title VII was enacted to prohibit.

II.

THE RESOLUTION OF THE BACK-PAY ISSUE WAS CORRECT

The District Court ordered the distribution of back-pay just fifteen days after final judgment over the objections of 661 class members. The great majority of the back-pay subclass refused to cash their checks[31] and the District Court then entered an Order which directed the class to cash their checks by December 15,

[31] The petitioner's counsel at the hearing of September 5, 1975 stated that approximately one-third of the 841 members of the back-pay subclass had cashed their checks by that date.

1975[32] or be deemed to have opted out of the case. (A. 105-108, 182-188). The Court of Appeals found this procedure unduly coercive on the exercise of rights of class members who opted into the settlement because they "were faced with the equally unpalatable alternatives of opting into a possibly invalid settlement or being relegated to individual lawsuits. A decision to opt into the settlement by endorsing the back-pay check and thereby releasing the company of all liability for past discrimination might preclude entitlement to a share in a new agreement or award if the settlement were invalidated on appeal. On the other hand, a decision to opt-out of the subclass by failing to cash the tendered check would create the possibility of receiving no back-pay award if the appeal were unsuccessful and an individual lawsuit proved unrealistic".[33] (A. 185). Because of the coercive effect of these procedures the Court of Appeals allowed class members who opted into the settlement to "reject their awards and participate in further back-pay proceedings" on remand.[34] (A. 186).

The petitioner argues that back-pay releases should not be invalidated without proof that they were executed voluntarily and knowingly. Their argument, however, neglects to mention that the back-pay settlement was distributed without any notice

[32] The final appealable order in this case was not issued until November 20, 1975 at which time the June 20 and 23, 1975 Motions for new trials were denied. The time for appeal did not expire until December 20, 1975.

[33] While the District Court allowed resort to independent lawsuits "free of the defense of res judicata or collateral estoppel", it did not waive the jurisdiction requirements of filing a timely charge of discrimination with the Equal Employment Opportunity Commission. See, *United Air Lines, Inc. v. Evans,* 431 U.S. 553 (1977). The vast majority of individual claims would have been untimely outside the class action.

[34] The Court of Appeals allowed the District Court to structure a means to assure that any subclass member who cashed their back-pay check would relinquish and repay the amount received if it were determined that they should have received a lesser award on remand. (A. 186 n. 82).

or hearing under Federal Rule of Civil Procedure 23 (e). (A. 173 n. 70, 180 n. 76, 181, 101 n. 22). The failure to provide such notice left the plaintiff class without the information essential to a "voluntary and knowing waiver".[35]

The petitioner's reliance on *United States v. Allegheny Ludlum Industries, Inc.,* 517 F.2d 826, 256 (5th Cir. 1975), is misplaced. That case required that all class members be provided "with comprehensive, relevant information about their rights... before any back pay is delivered and before any releases are signed. Such information is calculated to insure that each electing employee settles knowingly and voluntarily, and with an understanding of the manner and extent to which the decrees remedy his or her grievance". *Id.* It was precisely such information which was denied the class and which operated together with the coercive effect of the opt-out, opt-in procedures to deny even the semblance of a voluntary and knowing waiver of rights under the Act. The Court of Appeals was correct not to condone such procedures and to require the petitioner to relinquish the advantage it wrongfully obtained.[36]

[35] While the Court of Appeals did not rest its invalidation of the releases on this ground, it affords a separate basis for this disposition. Without invalidating releases that are submitted to a class absent notice of opportunity to object, defendants would be given an incentive to tender releases arbitrarily and without compliance with Rule 23(e). A complete breach of the requirements of Rule 23(e) should *per se* require invalidation of the settlement and releases given without notice.

[36] Since the petitioner states that its argument concerning the usurping of the District Court's discretion over the back-pay award and the class members' burden to demonstrate that they were victimized by unlawful discrimination is only "reserved" in case its Petition is granted, these arguments are not addressed herein. Pet. for Cert. 2 n. 1, 41-43. It should be noted, however, that nothing in the Court of Appeals decision dictates that the District Court apply any certain standard in determining back-pay on remand. The decision below only requires that if a discernible group of the class is to be barred from consideration for back-pay then that determination have a rational basis supported by competent evidence in the record. (A. 164-169). Contrary to petitioner's argument that the Court of Appeals decision would allow relief for employees who never applied for promotions or transfers and who were not dissuaded from doing so by the illegal practices, the Court below

CONCLUSION

For the foregoing reasons the Petition For a Writ of Certiorari should be denied.

Respectfully submitted,

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permitted the petitioner to prove the existence of class members not injured by the condemned practices by "statistically fair exhibits" and stated clearly that its concern was limited to assuring "an award of back pay to each and every *aggrieved* employee." (A. 165, 170). The decision below is entirely consistent with *Albermarle Paper Co. v. Moody, supra,* and *Teamsters v. United States, supra.*